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Supreme Court of the United States

October Term A. D. 1955

No. 640

HENRY L. DEBUSK, *Petitioner,*

vs.

THE UNITED STATES, *Respondent*

Petition by Henry L. DeBusk for a Writ of Certiorari to review a judgment of the United States Court of Claims entered July 12, 1955 *Dismissing a Petition for a Money Judgment Against the United States.*

HENRY L. DEBUSK, *Petitioner*
1924 17th Street, Lubbock, Texas

CHARLES C. CRENSHAW, Sr.
Licensed with the Supreme Court
Central American Life Bldg.
Lubbock, Texas

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SUMMARY OF THE MATTER INVOLVED

To The Chief Justice of The United States and the Associate Justices of The Supreme Court:

Petitioner was an employee of the United States and had been for some eight or nine years when this controversy arose. He sued for accrued salary and reinstatement to his postion with the government from which he was illegally discharged. (Tr 1) He claimed all benefits under 58 Stat. 390, 5 U.S.C. 863 (Tr 32).

The main contentions are as follows:

1. The dismissal was arbitrary, capricious, and contrary to the Veterans Preference Act, supra, 5 U.S.C. 863.

2. The dismissal was contrary to the procedure proposed to be followed by the agency and a regulation of an executive department, to-wit: Section 22.09 d (4) c, Chapter 20, Veterans Administration Manual for Personnel Administration.

3. The Court of Claims erred in following Kiem vs. United States, 177 U.S. 290 decided several decades prior to the enactment of 5 U.S.C. 863. (See Exhibit A, Page 6 thereof).

4. The decision is in conflict with previous decisions by the United States Court of Claims.

Knotts vs. United States, 121 Fed. Supp. 630.
Crocker vs. United States, 127 Fed. Supp. 568.
Blackmar vs. United States, 120 Fed. Supp. 408.

The foregoing cases under facts similar to this case were decided in favor of the accused on the grounds that the dismissals were not for the efficiency of the service but for personal reasons.

STATUTES AND REGULATIONS INVOLVED

Section 14 of the Veterans' Preference Act of 1944, Chap. 287, 58 Stat. 390, 5 U.S.C. 863, is as follows:

> No permanent or indefinite preference eligible who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to, shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment *except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice* (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), *stating any and all reasons, specifically and in detail, for any such proposed action;* such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in

accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative; *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of Section 15 hereof.

Section 22.09 d (4)c of Chapter 20 of the Veterans Administration Manual for Personnel Administration reads as follows:

(c) *Simultaneous Notice of Grounds for and Effective Date of Intended Removal for Cause.* Where action is warranted, the notice of grounds for the intended removal and the notice of the effective date of the intended removal will be accomplished simultaneously by a single letter. The appropriate key line official, with the advice and assistance of the appropriate personnel official, will prepare such letter or cause it to be prepared. If there is agreement between the key line official and the personnel official, such letter will be transmitted to the offending employee without reference to higher authority. If there is disagreement between the key line official and the personnel official, the matter will be referred to the appropriate disciplinary official for decision. In either event, the letter *will be signed by the key line official, countersigned by the personnel official,* and transmitted to the ac-

cused employee at least 30 days before the effective date of the intended removal. Where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed, compliance with the 30-day notice provision is not required.

THE CHARGES MADE

1. Improper attitude toward supervisors.

2. Not accepting instructions from supervisors (Petitioner has had at all times a satisfactory service rating).

3. Disrespect for supervisors.

4. Making statements constituting threats to supervisors.

Not one charge alleges it is for a cause "which will promote the efficiency of the service" as required by 5 U.S.C. 863. The letter proposing Petitioner's discharge was not signed by the Personnel Officer as required by Section 22.09 d(4)c, Chapter 20, Veterans Administration Manual for Personnel Administration.

The Court of Claims observed in its opinion:

> "Plaintiff lost his appeal before the agency hearing committee on the proposed removal." (Tr. 33).

The decision of that committee was as follows:

> "Since this is the first time the employee has been charged with insubordination, *it is the recommendation of this hearing committee that the employee, Mr. Henry L. DeBusk, not be removed from his employment with the Veterans' Administration.*"

The dismissal by the Manager of the Veterans' Administration was in total disregard to this recommendation. His letter of dismissal states that the dismissal was in part on Petitioner's past record and Petitioner's past record was never anything but satisfactory. (Tr. 26 & 27).

The Court of Claims made a determination:

> "An examination of the entire record gives the impression that *none* of the charges against Plaintiff (Petitioner) was very serious." (Tr. 38).

Why then was Petitioner's discharge sustained by the Court? The decision is bottomed on the old and erroneous doctrine "The King can do no wrong". This whole procedure is contrary to the letter and spirit of the Veterans Preference Act of 1944 and amendments thereto.

BRIEF FACTS

Petitioner's version of material facts as shown by the record is set forth in his original petition. (Tr. 1 et seq.)

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction under Section 1255 (1), 28 U.S.C.

"Court of Claims; certiorari; certified questions.

> 1. By writ of certiorari granted on petition of the United States *or the claimant.*"

See, also, Rule 41, Supreme Court Rules.

The Federal Statute, interpretation of which is involved, is Section 14, Veterans Preference Act or 5 U.S.C. 863 as copied in this petition.

The Regulation involved is Section 22.09 d(4)c, Chapter 20, Veterans Administration Manual as copied in this petition.

The decision which the Supreme Court is requested to review was decided July 12, 1955 and a copy is attached as Exhibit A. Pertinent parts of the adminis-

trative decisions are shown in the opinion of the court at pages 9 and 10 of this petition.

Motion for rehearing was overruled November 8, 1955 and application for transcript of the record was made immediately thereafter.

The nature of the case and the rulings of the Court of Claims are such as to bring this case within the jurisdictional facts relied upon and the grounds and questions involved are substantial and bear upon substantial rights guaranteed to a preference eligible veteran under the law and regulations.

QUESTIONS PRESENTED

1. Was Petitioner's removal in compliance with the procedure required by the Veterans Preference Act?

2. Was Petitioner's notice of proposed removal in compliance with Section 22.09 d(4)c, Chapter 20, Veterans Administration Manual for Personnel Administration?

3. Were the charges against Petitioner sufficient as a matter of law and, if true, did the charges allege "such cause as will promote the efficiency of the service" as required by Section 14, Veterans Preference Act or 5 U.S.C. 863?

4. Does the Veterans Preference Act give a preference eligible veteran any rights which a veteran did not have when Kiem vs. United States, 177 U.S. 290 was decided?

REASON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The case presents a question of law and the interpretation of a Statute of the United States never before passed upon by the Supreme Court.

2. The decision by the Court of Claims nullifies rights guaranteed to a preference eligible veteran in Section 14, Veterans Preference Act or 5 U.S.C. 863.

3. The decision of the Court of Claims in this case is in conflict with prior decisions of the same Federal Court.

4. Petitioner's motion for judgment on the pleadings should have been sustained.

5. The recommendation of the committee which heard the evidence in the first instance should have been followed.

6. The charges against Petitioner were frivolous and insufficient as a matter of law.

7. The procedures required and proposed by the agency to be used as set forth in Section 14 of the Veterans Preference Act and Section 22.09 d(4)c, Chapter 20, Veterans Administration Manual for Personnel Administration, were not followed.

8. The satisfactory rating, covering every element included in the charges made, and received by Petitioner on January 31 prior to the date the charges were determined by the Manager sufficient for dismissal on February 2, was a bar to such action for dismissal, because the satisfactory rating was a determination in conflict with the subsequent dismissal.

Wherefore, Petitioner prays that writ of certiorari be granted, that the decision of the Court of Claims be reversed and rendered for Petitioner and, in the alternative, that the case be reversed and remanded.

HENRY L. DEBUSK
Petitioner,
1924 17th Street,
Lubbock, Texas

CHAS. CRENSHAW, SR.
Licensed to practice before the Supreme Court.
Central American Life Bldg.
Lubbock, Texas

Henry L. DeBusk

EXHIBIT A

No. 284-54

(Decided July 12, 1955)

HENRY L. DEBUSK v. THE UNITED STATES

Mr. Henry D. DeBusk, pro se.

Mr. Edgar H. Brenner, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant.

Mr. Martin E. Rendelman was on the brief.

ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT.

OPINION

JONES, *Chief Judge,* delivered the opinion of the court:

Plaintiff who was formerly an employee of the Veterans' Administration brought this suit to recover pay from the date of his allegedly illegal discharge by that agency. Plaintiff has moved for judgment on the pleadings. The Government opposes this motion and makes a cross motion for summary judgment.

Plaintiff held the position of Loan Examiner, GS-7, $4580 per annum, in the Veterans' Administration Regional Office, Lubbock, Texas. It is conceded that he was entitled to veterans' benefits under the Veterans' Preference Act of 1944, 58 Stat. 387, 390 (5 U.S. C. 863, 1952 Ed.). By letter dated December 22, 1952, signed by C. M. Harvin, Loan Guaranty Officer, plaintiff was formally advised, in part, as follows:

> In accordance with applicable VA regulations and Section 14 of the Veterans' Preference Act of 1944, you are hereby notified that it is proposed

> to effect your removal for cause based on the following charges:

The letter then listed the charges, giving specific instances in each case. The four charges were: improper attitude toward supervisors, not accepting instructions from supervisors, disrespect to supervisors, and making statements contituting threats to supervisors. Paragraph 2 of the letter stated:

> The above (the charges) and your past record will be considered in determining proper disciplinary action, if one or more of the above charges is sustained.

The letter also informed plaintiff of his right to reply and to a hearing under the Veterans' Administration hearing and appeal procedure.

Plaintiff lost his appeal before the agency hearing committee on the proposed removal and was removed from his position on February 2, 1953. He thereupon perfected an appeal to the Civil Service Commission. This agency's 14th Regional Office granted him a hearing before an Appeals Examiner at which both the *Plaintiff* and the Veterans' Administration presented testimony of witnesses and other evidence. The Appeals Examiner held, in part:

> We are of the opinion that the statements admittedly made by appellant, as set forth by the agency's letter of charges, clearly disclose that Mr. DeBusk is not amenable to supervision. * * * In view of the above findings and since we feel that the record as established by the hearing is sufficient to warrant a removal action, appellant's appeal must be denied. It therefore follows that the effected action was not contrary to or in vio-

lation of Section 14 of the Veterans' Preference Act of 1944.

Plaintiff's appeal to the Civil Service Commission also was rejected. In a letter dated June 14, 1954 the Chairman of the Civil Service Commission's Board of Appeals and Review stated in part:

> Reference is made to your appeal under section 14 of the Veterans' Preference Act * * * .
>
> The Commissioners, after careful consideration of all the evidence developed in connection with the case, have determined that the four specific charges, which were based on your office demeanor, were of sufficient gravity to fully warrant removal despite an overall performance rating of "Satisfactory." The charges were supported by evidence of your disparaging statements and defiant attitude towards supervisors. In view of the foregoing the decision of the Regional Office is affirmed.

On December 8, 1952 plaintiff's supervisors delivered to him an "Unsatisfactory" performance rating. Despite extensive statements in the briefs as to what transpired in connection with this performance rating, the record definitely discloses only that, by letter dated January 29, 1953 the chairman of a subcommittee of the Performance Rating Committee at plaintiff's station advised plaintiff that his performance rating for the period November 8, 1951 to December 4, 1952 had been changed from "Unsatisfactory" to "Satisfactory."

Plaintiff contends that his removal was improper for six different reasons. First, he says that the decision to remove him was made by the "Manager and not

by the Chief Law Officer of the Regional Office," as allegedly required by 5 CFR 22.10 (a) (1949 Ed. 1954 Cum. Pockt. Supp.). This regulation reads:

> 22.10 *Decision in the Commission* — (a) *By whom made; contents.* The decision on the appeal shall be made by the Chief Law Officer or the regional director, as appropriate, in a finding consisting of an analysis of the evidence, the reasons for the conclusions reached and the recommendation for action to be taken by the employing agency concerned. A recommendation may be made to the employing agency for corrective action, including restoration of the employee to duty retroactively to the effective date of the discharge, suspension for more than 30 days, furlough without pay, or reduction in rank or compensation, as the case may be.

The above quotation is part of a series of regulations under the heading: CHAPTER 1—CIVIL SERVICE COMMISSION. Part 22 — Appeals of Preference Eligibles Under the Veteran's Preference Act of 1944. The first of these regulations reads:

> 22.1 *Applicability of regulations*—(a) *Coverage.* The regulations in this part shall govern appeals to the Commission by permanent and indefinite preference eligible employees from adverse decisions of administrative officers of the Federal Government and the government of the District of Columbia, more specifically defined hereinafter.

It is evident, therefore, that the regulation upon which plaintiff relies speaks of the Chief Law Officer,

an official of the *Civil Service Commission*, and that it does not attempt to specify what official of a particular employing agency must make the decision as to an employee's removal. There is no merit in plaintiff's first contention.

Likewise without merit is plaintiff's argument that neither the agency's letter of charges, nor the opinion of the Appeals Examiner of the Civil Service Commission nor the letter from its Board of Appeals and Review specifically stated that plaintiff's removal was for a cause that "will promote the efficiency of the service." However, all three of these documents referred to section 14 of the Veterans' Preference Act of 1944, *supra*, which provides, in part, that no permanent or indefinite preference eligible shall be removed "except for such cause as will promote the efficiency of the service." *It is natural to conclude that these men would not have cited this statute without having in mind the standard of adjudication set out therein. From the circumstances of this case it appears that the administrative officials did in fact invoke the proper standard, and the mere absence of an express invocation of the statutory standard cannot, under such circumstances, have an effect on the validity of an otherwise valid personnel action.*

Plaintiff cites the fifth amendment to the Constitution of the United States in support of his next contention that his removal constituted "double jeopardy." The material portion of this amendment provides:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

Plaintiff's argument appears to be that the charges upon which he was removed were also considered in connection with his performance rating and that the

administrative determination on the performance rating constituted an adjudication on the charges, thereby precluding subsequent consideration of the same charges in connection with the removal.

But the amendment was not intended to cover the sort of proceedings involved in this case. It has been held that removal from Government service, as distinguished from permanent proscription therefrom, is not punishment. *Bailey v. Richardson*, 182 F. 2d 46. Certainly giving plaintiff an "Unsatisfactory" performance rating is not punishment. If it is not punishment, then the hearing thereon has not subjected plaintiff to jeopardy. There is, therefore, no basis for "double jeopardy."

Plaintiff's fourth contention involves the lack of specificity in the charges. He maintains that the statement in the charges that the "above and your past record will be considered in determining proper disciplinary action," indicates that the agency based its decision, at least in part, upon unspecified parts of his past record. From the opinion of the Civil Service Commission's Appeals Examiner and the letter of the Chairman of its Board of Appeals and Review, it is clear, however, that they restricted their consideration to the specific charges. Moreover, we do not think that plaintiff has placed a fair construction on the statement quoted from the letter of charges. It appeared in a separate paragraph after a long recital of specific charges and could not have been intended, in the context, as still another charge justifying the proposed action.

Plaintiff also contends that his removal was invalid because the charges served on him by the agency were not countersigned by the appropriate personnel offi-

cial as required by section 22.09 d (4) c of Chapter 20 of the Veterans' Administration Manual for Personnel Administration, dated August 28, 1947. This section provides:

> (c) *Simultaneous Notice of Grounds for and Effective Date of Intended Removal for Cause.* Where action is warranted, the notice of grounds for the intended removal and the notice of the effective date of the intended removal will be accomplished simultaneously by a single letter. The appropriate key line official, with the advice and assistance of the appropriate personnel official, will prepare such letter or cause it to be prepared. If there is agreement between the key line official and the personnel official, such letter will be transmitted to the offending employee without reference to higher authority. If there is disagreement between the key line official and the personnel official, the matter will be referred to the appropriate disciplinary official for decision. In either event the letter *will be signed by the key line official, countersigned by the personnel official,* and transmitted to the accused employee at least 30 days before the effective date of the intended removal. Where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed, compliance with the 30-day notice provision is not required.

As appears from an affidavit by Mr. C. M. Harvin, the Loan Guaranty Officer, made in connection with another suit filed elsewhere by plaintiff and appended by plaintiff to his motion for judgment on the pleadings here, the charges filed against plaintiff were made

with the advice and assistance of the appropriate personnel official, even though he did not countersign the notice. Thus the omission of the personnel officer's signature amounts in this case to n omore than a technical violation of the regulation.

Furthermore, plaintiff does not cite any statute of Congress which prohibits his removal except in accordance with rules promulgated by the Veterans' Administration. See *Keim v. United States*, 177 U.S. 290. Neither section 652 of Title 5 of the United States Code (1952 Ed.) nor the Veterans' Preference Act of 1944, *supra*, contemplates such a restriction upon executive discretion.

Plaintiff's last argument involves an alleged inconsistency in the action of the administrative agency. He says that it was inconsistent for the agency at one and the same time to find that he was, in effect, not amenable to supervision and also to give him a "Satisfactory" performance rating. It does not appear from the record that the same charges which formed the basis of plaintiff's removal were found to be unwarranted when the determination on his performance rating was made, or that the performance-rating authorities actually found plaintiff to be cooperative or effective in dealing with others. Moreover, there is not necessarily a contradiction between plaintiff's removal and his "Satisfactory" rating. A performance rating evidently is a composite rating which takes into account many phases of a person's work. Even if the character of one's work were such as to cause it to be classed as satisfactory or at least such as one would not want to class as unsatisfactory, *yet he may be so defiant toward those under whom he is working*

and so critical of his co-worker as to disrupt an organization to such a degree as to justify his removal.

An examination of the entire record gives the impression that none of the charges against plaintiff was very serious. On the other hand, some of his admitted *outbursts* against his superiors in rank, and his critical reference to the conduct of his co-workers seemed out of place, since they had reference to matters that were outside his own jurisdiction, and concerned matters for the correction of which others were clothed with responsibility. If the conduct of his superiors and co-workers was improper, as plaintiff alleges, the remedy lies in the established procedures. Certainly it could not be corrected by internal conflicts in the operation of a large organization.

The hearing officer, after hearing plaintiff and other witnesses, determined that the conduct of the plaintiff was such as to justify his removal. The finding was affirmed on appeal. We cannot say that action was *arbitrary, capricious,* or not supported by substantial evidence. Any additional hearing would be a mere elaboration of the testimony already given. Plaintiff's motion for judgment on the pleadings is denied, defendant's motion for summary judgment is allowed, and the petition is dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.